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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-[illegible] 1

TERMINAL FREIGHT COOPERATIVE ASSOCIATION and TERMINAL FREIGHT HANDLING COMPANY,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

REPLY BRIEF ON BEHALF OF PETITIONERS.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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The Board's Opposition Memorandum herein requires brief response in several respects:

A. ON THE MERITS.

1. The Board's Failure to Address the Question Presented.

The Board's discussion, however brief, of the issue presented here argues from a factual and conceptual perspective that is not involved in this proceeding. This case does not present an instance where the General Counsel has determined that no violation of law has occurred; the General Counsel did not conclude that relief was uneces-

sary; the charging parties—petitioners do not seek review of the General Counsel's refusal to conclude that the National Labor Relations Act was violated. Rather, and unlike *Vaca* v. *Sipes*, 368 U. S. 171 (1967), which the Board cites as if its facts paralleled this case, here the General Counsel did conclude that the Act was violated and that the Board's processes should be involved in an effort to secure appropriate relief.

The Board fails to address itself, as did the court below, to the thrust of petitioners' contention in this case, i.e., that the General Counsel's act of making a decision on the merits of pending charges effects an exhaustion of the discretion conferred upon him in Section 3(d) of the Act, not the issuance of the document entitled "Complaint". Nor did either the court, or the Board in its Memorandum, distinguish the situation in which the failure to issue that "Complaint" was based on the General Counsel's belief that no violation of law was committed, which is an unreviewable decision, and the quite different situation presented here, in which that refusal traced only to the General Counsel's choice among alternative forms of remedy in meritorious cases.[1]

The combination of these oversights has led the Board to an erroneous conclusion. By assuming that it is the issuance of the Complaint itself which transfers a case to the Board, rather than the decision that unlawful acts occurred of which the Complaint is one of various alternative results, the Board's Memorandum concludes that pre-Complaint settlements are immune from review. That it is the decision and not the document that confers jurisdiction on the Board

1. The court below mistakenly understood the petitioners to argue that the filing of an injunction petition by the General Counsel which recited that "a Complaint should issue" was equivalent to the issuance of a Complaint. Rather, it was petitioners' contention that such a recital merely evidenced the fact that the General Counsel had made his decision on the merits and thereby exhausted his discretion under Section 3(d).

follows not only from the logic of the arguments to which the Board fails to respond but is an express holding of the Ninth Circuit in an opinion issued subsequent to the filing of the petition for certiorari herein. In *Waterway Terminals Co.* v. *N. L. R. B.*, ... F. 2d ....., 81 LRRM 2449 (CA 9, October 10, 1972), the court held that judicial review is available from the dismissal of a hearing under Section 10(k) of the Act despite the argument that such review is barred because the General Counsel had not issued a Complaint. In proceedings under Section 8(b)(4)(D) of the Act, issuance of a Complaint is withheld pending the related Section 10(k) proceedings. The latter are instituted upon finding of reasonable cause to believe the law was violated, hence are analogous to petitions for injunction under Section 10(l), as is involved in the instant proceeding.

2. The Decision in Waterway Terminals Co. Presents a Conflict in the Circuits.

Both in *Waterway* and here, ancillary proceedings to the Board's final adjudication on the merits were undertaken on the basis of the same finding of probable cause; in both instances no Complaint was issued; in both instances the Board urged that review of administrative conduct was barred by the failure to issue that document. Whereas the court below adopted the Board's argument, the court in *Waterway* did not. Yet both equally involved action by the Board in disposing of the merits of a pending charge. Both, therefore, involved an appealable "final order of the Board". Whatever differences may exist between Sections 10(k) and 10(l), Section 3(d) applies equally to both; if all pre-Complaint decisions are unreviewable in the one instance as a consequence of the operation of 3(d), then presumably the same result should apply in the other. That

courts have taken differing views on the matter warrants this Court's clarification.[2]

This Court has recently been confronted with a case which raises the question which the Board erroneously treats as being involved here. In *Saez* v. *Goslee*, No. 72-440, this Court denied a petition for writ of certiorari in which the petitioner sought, in effect, to secure review of General Counsel's refusal to issue Complaint *where the General Counsel found no merit to the charge filed.* Here, the General Counsel found merit in the charges filed by the aggrieved parties but determined not to issue a Complaint for reasons unrelated to the question of the existence either of injury or a violation of statutory right. The distinction between the *Saez* case and the instant case lies at the heart of the instant petition but has received no recognition either by the Board or the court below.

The petitioners herein seek no disruption of Board processes[3] nor, as in *Saez*, do petitioners seek a hearing for every unfair labor practice filed, nor even any review of decisions by the General Counsel that charges lodged with him lack merit. Rather, petitioners seek only to secure review of the General Counsel's disposition, absent the aggrieved charging parties' consent and over their objections, and without hearing, however restricted, of those cases in which the General Counsel has determined that remedial injury has occurred to their statutory rights. No basis has been suggested by the Board or the court below to establish Congress' intent that review in such cases is to be foreclosed by Section 3(d) of the Act and the "unreviewable discretion" it is alleged to afford.

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2. Wholly apart from the *Waterway* decision, a conflict in the Circuits already existed by virtue of the Eighth Circuit's decision in *Sears, Roebuck and Co. et al.* v. *Solien*, 450 F. 2d 353 (CA 8, 1971) (see pages 15 and 16 of petition for writ of certiorari).

3. Nor does the Board contend that the result sought by petitioners would have that effect.

B. ON THE TIMELINESS OF THE PETITION.

These petitioners, comprising over forty national companies which have in the past been aggrieved by the conduct of the General Counsel which is challenged here, have diligently and in good faith sought clarification of both the question posed here and related questions of charging parties' rights before the Board. The Board's Memorandum in Opposition, at footnote No. 2, constitutes ample proof of that fact. The problems attendant to the filing of the instant petition, not wholly chargeable to petitioners, should not, as a matter of sound procedure and equitable practice, prohibit review of important questions so earnestly pursued. The delay in filing the printed petitions, to which the Board's Opposition makes reference, being in part a function of when notice was received by principal counsel of the Court's action on the motion for extension of time and in part a result of the decision-making process which followed, should not be taken to reflect doubt on the serious averment of experienced counsel.

Respectfully submitted,

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